

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,) Judge Gaughan
) Cleveland, Ohio
vs.)
) Number 1:16CR224
BOGDAN NICOLESCU,)
RADU MICLAUS)
)
Defendants.

- - - - -
TRANSCRIPT OF PROCEEDINGS HAD BEFORE

THE HONORABLE PATRICIA ANNE GAUGHAN

JUDGE OF SAID COURT,

ON MONDAY, MARCH 25, 2019

Volume 1
- - - - -

Official Court Reporter: Shirle M. Perkins, RDR, CRR
U.S. District Court
801 West Superior, #7-189
Cleveland, OH 44113-1829
(216) 357-7106

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

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1 MONDAY SESSION, MARCH 25, 2019, AT 9:19 A.M.

2 * * * * *

3 (Jury impaneled and sworn.)

4 (The following proceedings were held at side
15:03:21 5 bar:)

6 THE COURT: Alternate Number 1 is now close to
7 tears because she can't be here.

8 MR. BROWN: I saw her when she was screaming
9 out in the hallway, Judge.

15:03:34 10 THE COURT: So you witnessed it?

11 MR. O'SHEA: It's Goldberg's fault. He should
12 have asked her.

13 THE COURT: Honest, I'm a little frustrated
14 right now, but she claims that she cannot be present. Mary,
15:03:50 15 you want to, for the record, fill in the blank.

16 DEPUTY CLERK: She said two weeks would be a
17 burden to her. Her kids are on spring break this week and
18 she works third shift. And I said why didn't you bring this
19 up in court. She said I was waiting for someone to ask
15:04:02 20 about the problem being the length of time. I said the
21 Judge said was there anything else.

22 THE COURT: So on behalf of the Government,
23 any problem with excusing her for cause?

24 MR. McDONOUGH: No, your Honor.

15:04:16 25 THE COURT: On behalf of Defendant Nicolescu?

1 MR. GOLDBERG: No, your Honor.

2 THE COURT: Defendant Miclaus?

3 MR. O'SHEA: No, your Honor.

4 THE COURT: Off the record.

15:05:13 5 (Proceedings resumed in the presence of the jury:)

6 THE COURT: Ms. Miller, you are now Alternate
7 Number 1.

8 ALTERNATE JUROR: Okay.

9 THE COURT: Ms. Higley, you are Number 2;
15:08:25 10 Mr. English, Number 3.

11 Ladies and gentlemen, we will go into opening
12 statements, but before we do so, I would like to explain
13 some of the rules that we will be following, and I hope my
14 Courtroom Deputy or judicial assistant can hear me. You
15:08:44 15 need notebooks.

16 Folks, give me have just one -- Mary, notebooks. All
17 right.

18 As she passes them out, I want to tell you some of the
19 rules we're going to be following during the course of this
15:09:19 20 trial.

21 I am going to permit you to take notes, but please let
22 me give you this instruction. Many courts do not permit
23 note taking by jurors. And a word of caution is in order.
24 There's always a tendency to attach undue importance to
15:09:37 25 matters which one is written down.

1 Some testimony which is considered unimportant at the
2 time presented and thus not written down takes on greater
3 importance later on in the trial in light of all of the
4 evidence presented.

15:09:52 5 Therefore, you are instructed that your notes are only
6 a tool to aid your own individual memory and should not --
7 and you should not compare your notes with other jurors'
8 notes in determining the content of any testimony or in
9 evaluating the importance of any evidence.

15:10:13 10 Your notes are not evidence and are by no means a
11 complete outline of the proceedings or a list of the
12 highlights of the trial.

13 Above all, your memory should be your greatest asset
14 when it comes time to deliberate and render a decision in
15:10:35 15 this case.

16 And, folks, please disregard when you see me take
17 notes. I take notes for an entirely different purpose from
18 the purpose you take notes. We have separate functions.

19 In addition, ladies and gentlemen, you may not conduct
15:10:54 20 any investigation on your own. That means you cannot go
21 online, use the computer, use any other means of
22 communication to find out any details of this case. You are
23 confined to the facts and evidence you hear in this
24 courtroom. No investigation on your own is permitted.

15:11:24 25 We've concluded the voir dire process. Next, we will

1 hear opening statements of counsel. And in the opening
2 statements, the attorneys seek to outline and describe for
3 you the evidence they expect will be adduced from the
4 witness stand.

15:11:39 5 Now opening statements are permitted because
6 oftentimes witnesses do not appear in what we would consider
7 to be proper chronological order. So an opening statement
8 really is an aid. It's a tool. You can hear the testimony
9 of a witness and relate it to the total picture that you
15:11:58 10 receive during the opening statement. But please keep in
11 mind opening statements are not evidence. They are merely
12 designed to assist you.

13 Following the opening statements of all three counsel,
14 the attorneys for the Government will then present their
15:12:18 15 evidence. Following that, the attorneys for the Defendants
16 may or may not present evidence. Following all of the
17 evidence, the attorneys will then give what we call closing
18 arguments, and much like opening statements, closing
19 arguments are not evidence. They are merely designed to
15:12:43 20 assist you.

21 So the Government will give their closing,
22 Mr. Goldberg, his, Mr. O'Shea's his, and then the law allows
23 the Government an opportunity to give what we call a
24 rebuttal argument. The reason is the Government has the
15:13:00 25 burden of proof. So the law allows the Government two

1 opportunities to address you.

2 Following all of the arguments, I will then give you
3 all of the jury instructions. Following the jury
4 instructions, the 12 jurors will then deliberate and arrive
15:13:20 5 at a verdict.

6 Now, folks, there are times during every trial where a
7 lawyer may object to a question being asked or object to an
8 exhibit his or her opponent is trying to get admitted into
9 evidence. These objections raise legal questions, and it's
15:13:36 10 my duty to rule on them. If I find under the law that the
11 objection is well taken, I will sustain the objection and
12 not permit the question to be answered. On the other hand,
13 if I find that the objection is not well taken, I will
14 overrule the objection and permit the question to be
15:14:00 15 answered.

16 Please keep in mind you must decide this case only on
17 answers that are permitted to be given under oath. You are
18 not permitted to infer anything merely because a question
19 was asked, and I did not allow it to be answered.

15:14:15 20 In addition, folks, I will either ask counsel to
21 approach side bar or they will ask permission to approach
22 side bar. Now what we do over here is one of two things.
23 We're either discussing a matter of law, or we're discussing
24 a matter of procedure: "Is the next witness available?
15:14:36 25 Judge, what time are we breaking," et cetera. In either

1 event, we're going to do it outside of your hearing.

2 Following that side bar, I will do one of two things:
3 I will either inform you of what just took place over there,
4 or more likely, I will merely put my decision into effect
15:14:55 5 without telling you any of the details.

6 Please remember, a trial is not a contest of skill,
7 learning, or tact between lawyers. It's a proceeding to
8 determine the truth, as well as the truth can be determined,
9 for the evidence and law you hear in this courtroom.

15:15:12 10 We will now hear opening statements, and one more
11 time, I am going to remind you. Opening statements are not
12 evidence. They are merely designed to assist you.

13 On behalf of the Government, I now call on Mr. Brian
14 Levine. Mr. Levine.

15:15:34 15 MR. LEVINE: Thank you very much, your Honor.

16 OPENING STATEMENTS ON BEHALF OF THE GOVERNMENT

17 MR. LEVINE: \$400,000, 9 and 2. This case is
18 about three numbers. 400,000, 9, and 2.

19 400,000, that's the number of computers in Ohio, in
15:16:09 20 the United States, and in the world, the Defendants, Bogdan
21 Nicolescu and Radu Miclaus, infected with a virus that they
22 created. And as a result, a lot of innocent people lost a
23 lot of money.

24 This virus allowed the Defendants to completely
15:16:31 25 control these computers. And by controlling these

1 computers, the Defendants stole user names and passwords,
2 they stole credit cards, and they stole millions of dollars.
3 400,000 infected computers.

4 9. Nine is the number of years it took the FBI and
15:16:59 5 others to identify the Defendants and their group. And
6 during the trial, we might refer to them as the Bayrob
7 Group, the Bayrob Group.

8 You'll learn they took nine years to identify
9 Defendants because they took tremendous effort to hide their
15:17:19 10 identity. They used every technological trick out there.
11 They even invented new technology to hide themselves on the
12 Internet. Nine years.

13 And 2. The last number is 2. And that's the number
14 of mistakes the Defendants made over the course of those
15:17:45 15 nine years that led the FBI and others to identify them.
16 Two mistakes.

17 My name is Brian Levine, a senior counsel with
18 Computer Crime and Intellectual Property Section of the
19 United States Department of Justice. I work out of
15:18:07 20 Washington, D.C. And Judge Gaughan already introduced the
21 rest of the prosecution team. So let's turn now to the
22 individuals who stole millions of dollars from innocent
23 people.

24 Bogdan Nicolescu. The evidence will show that he went
15:18:26 25 by the nickname MasterFraud. That's the name he picked for

1 himself. MasterFraud, and you will see sometimes
2 abbreviated it as lower case "mf." He also went by the
3 nickname Obie.

4 And also sitting with Bogdan Nicolescu is his
15:18:49 5 codefendant, Radu Bogdan Miclaus. The evidence will show
6 that he went by the nickname Minolta9797, sometimes
7 abbreviated as lower case m-i-n. Minolta9797. He also went
8 by the nickname, Ferdy, F-E-R-D-Y.

9 Before the Defendants had 400,000 victims, they had
15:19:25 10 one. And you will hear from the first victim to report this
11 crime to the FBI, Yvonne Liddy. Yvonne Liddy contacted the
12 FBI in 2007, 12 years ago.

13 Yvonne is from Perry, Ohio, and in 2007, she was still
14 in school and she was a stay-at-home mother. In 2007,
15:19:49 15 Yvonne and her husband went on eBay. Many of you are
16 familiar with eBay. It's a website where sellers post
17 pictures of the items they want to sell and buyers can buy
18 those items, either from an auction format or sometimes
19 buying directly.

15:20:03 20 So Yvonne and her husband went on eBay and bought a
21 used Jeep Liberty for just shy of \$10,000, which was a lot
22 of their savings at the time. So they purchased the jeep,
23 they transferred the \$10,000 from Yvonne's bank account but
24 they never got the jeep. So you'll learn that Yvonne went
15:20:27 25 to the police. She went to the local police and the police

1 had her come in and they had her log on, on the police
2 computer, log on to her eBay account and show them the
3 transaction.

4 So she logs on, but she can't pull up the transaction.
15:20:41 5 It's not there in her account. She's confused. So Yvonne
6 goes home. You'll learn she logs on to eBay from her own
7 computer at home, and there it is. There's the transaction.
8 So she calls eBay. EBay has no record of the transaction at
9 all.

15:21:02 10 So what happened? Yvonne was the victim of fraud.
11 She was the victim of a sophisticated eBay fraud scheme
12 designed by the Defendants and others in their group, and
13 here's how it worked.

14 The Defendants placed over a thousand fake
15:21:24 15 advertisements to sell cars on eBay. Now the Defendants,
16 they never had these cars. All they had were pictures of
17 cars. And the prices were good. They were a good deal.
18 They weren't crazy loans. They were reasonable. Now before
19 buying something expensive like a car online, buyers would
15:21:45 20 invariably e-mail questions to the seller. Right?

21 Questions about the car. What's the mileage, how's the
22 transmission, has it been in any major accidents?

23 And when Defendants responded to these e-mails, they
24 answered the question, but they'd also send the buyer a
15:22:04 25 picture viewer and the picture viewer was an attachment to

1 the e-mail attached to the e-mail, and when a buyer clicked
2 on the picture viewer, they would see pictures of cars, and
3 it could click through the pictures of cars, but that's not
4 all that was going on because in the background, they were
15:22:26 5 getting infected with a virus. And once the buyer had the
6 virus, the Defendants had complete control of the buyer's
7 computer.

8 Now, when the buyer went back to the eBay website,
9 they were not actually viewing eBay. Instead, the
15:22:50 10 Defendants were controlling exactly what the victim would
11 see. And on the fake eBay website, eBay offered something
12 special; something called eBay Agent Protection. And now,
13 the idea was that eBay said buyers could protect themselves
14 by wiring money not to the seller of the car but to an eBay
15:23:16 15 escrow agent, who would hold the money, would hold the money
16 to protect the money until the buyer was satisfied, the
17 buyer receives the car, fully satisfied with the car they
18 received, and only then would the seller get it.

19 In fact, the real eBay had no eBay escrow agent
15:23:37 20 program. It was something the Defendants made up out of
21 thin air. So where did the buyer's money go to? It went to
22 more unsuspecting victims called Money Mules.

23 Now Money Mules is a person that receives money into
24 their bank account and then withdraws it and sends the money
15:23:58 25 to others, often via Western Union. So Defendants created

1 fake advertisements, job advertisements for wire transfer
2 agents, which they circulated on Internet websites, and on
3 Job Corps. This is one that they circulated on Facebook.
4 Make \$7500 a month working from home. Who wouldn't want to
15:24:33 5 do that? Who wouldn't want to do that?

6 So people in Ohio and elsewhere in the United States
7 would sign up with the Defendants' fake wire transfer
8 companies, and they would send their personal bank account
9 information to Defendants. And you'll hear from some of
15:24:53 10 these people. For example, you'll hear from Donna Wolfe
11 about how she was tricked into being a wire transfer agent
12 and how Defendants manipulated her.

13 So Donna Wolfe and the other money mules would receive
14 wire transfers from eBay victims like Yvonne Liddy and
15:25:14 15 follow the Defendants' instructions to withdraw the money
16 immediately and wire the money via Western Union to
17 somewhere in Europe. And in Europe, another money mule
18 would pick up the money at the Western Union there, using a
19 fake ID. And eventually, the money was delivered to the
15:25:37 20 Defendants.

21 Yvonne Liddy and hundreds of other victims never got a
22 car, and they never got their money back, not from the bank,
23 not from Defendants, not at all. All they got was infected
24 with a virus.

15:25:56 25 Now, Defendants didn't just use the virus to trick

1 people on eBay. You'll learn that they also used their
2 virus to copy the victims' e-mail contact list, all their
3 e-mails, whether in the Microsoft Outlook or their Gmail, or
4 their Yahoo mail, what every they used, they copied every
15:26:16 5 single e-mail address, and this allowed the Defendants to
6 send spam, spam e-mails to hundreds of thousands or millions
7 of additional e-mail addresses in order to spread their
8 virus and infect more people.

9 Here's why the spam e-mails the Defendants sent --
15:26:37 10 they sent a lot of different ones but this is one. "Western
11 Union. You've received money. To receive your money, print
12 the attached document and take it to Western Union." There
13 was a document attached to the e-mail. Well, if you
14 click -- you click on that attachment, you would get the
15:26:56 15 virus.

16 Now, Defendants also used the virus to steal user
17 names and passwords. So if one was infected with the virus,
18 and they went to Gmail or Yahoo mail or a whole bunch of
19 other sites, you think you are on Google or Yahoo's website,
15:27:14 20 but you're actually on the Defendants' website. So when you
21 entered your user name and password, Defendants have it.

22 Now, Defendants would then log you on to Gmail or
23 Yahoo so you'd never know the difference. And they did this
24 with many websites. Defendants would steal all these user
15:27:35 25 names and passwords so that they could control these

1 accounts or they could sell them to others.

2 Defendants also used their virus as a trick to trick
3 people into giving them their credit card numbers. And
4 here's how they did that. Where a victim went to websites
15:27:56 5 like Facebook, like eBay, like Wal-Mart, and they were
6 infected with the virus, Defendants used their virus to
7 redirect the victims to a fake website that looked just like
8 Facebook or eBay or Wal-Mart, and victims were now required
9 to enter into their -- enter in their credit card number to
15:28:19 10 verify the account. We just want to make sure that this is
11 really your account. So yes, user name and password but
12 this time, we want to also really make sure it's you. So
13 put in your credit card information as well. And once the
14 victims entered their credit card numbers, Defendants would
15:28:37 15 log them into their accounts. So the victims never knew the
16 difference.

17 Now, Defendants would use these stolen credit cards
18 and actual people's identities to fund their criminal
19 activities.

15:28:51 20 Now, Defendants used their computers and their virus
21 to control thousands of computers in the United States. And
22 eventually, the group was able to create what's called a
23 botnet. A botnet is an army of infected computers. They're
24 centrally controlled by the criminal. In this case, they
15:29:17 25 were centrally controlled by Defendants.

1 Now Defendants were able to avoid law enforcement by
2 hiding their path to the Internet. They hid their path to
3 the Internet. You know how they got on the Internet? They
4 started with this. This was actually seized from the
15:29:39 5 Defendant Miclaus' apartment. They had this in all the
6 apartments.

7 Now what this is, is a directional antenna, a
8 directional antenna. And they would use this to hack on to
9 someone else's home Wi-Fi, somewhere in Bucharest or Brasov,
15:29:58 10 Romania. It has a very -- you'll learn this is a very long
11 range. So they could hack into 1,000 or millions of
12 people's Internet, their home Wi-Fi. So when they were
13 committing the crimes, they never appeared to be coming from
14 their own Internet. Making it extraordinarily hard to
15:30:18 15 identify them.

16 Now they also used a service called America Online or
17 AOL sometimes referred to. America Online or AOL, and they
18 used it to access the Internet. Now AOL was able to
19 identify the e-mail addresses that these two Defendants used
15:30:38 20 to communicate with each other. Not with victims, but with
21 each other, how they would talk to each other.

22 Nicolescu, he used the nickname MasterFraud. He used
23 that e-mail account. And Miclaus, he used the account
24 Minolta9797. So the FBI executed search warrants on these
15:31:04 25 accounts and other accounts. And it led to hundreds or

1 thousands of e-mails between MasterFraud and Minolta and the
2 other members of their group, but the FBI still didn't know
3 who they were. They just knew they were MasterFraud and
4 Minolta. And that's when two mistakes come into play.

15:31:36 5 Mistake Number 1, this happened on May 13, 2013, May
6 13, 2013, and it took 90 seconds. Minolta9797 accidentally
7 entered the user name to his personal e-mail account into
8 AOL. RaduSPR, RaduSPR. He accidentally entered that user
9 name while on AOL. Now he quickly realized his mistake and
15:32:14 10 he entered his criminal user name, Minolta9797, but AOL had
11 captured, America Online had captured RaduSPR and RaduSPR
12 was easily connected to Radu Bogdan Miclaus.

13 This was his Twitter page. This was information from
14 a subpoena that the FBI sent to Yahoo, and it showed an
15:32:48 15 address for Radu Miclaus in Bucharest, Romania. So RaduSPR
16 was Radu Bogdan Miclaus.

17 The FBI asked Romanian National Police, which we
18 sometimes refer to as the RNP, the Romanian National Police,
19 the RNP. They asked the Romanian National Police to
15:33:14 20 investigate Miclaus, and RNP identified regular Internet
21 communications between Miclaus and two other people. One of
22 those people was Bogdan Nicolescu, who we know is
23 MasterFraud, and there was also communication with someone
24 we haven't talked about yet, a person by the name of Tiberiu
15:33:42 25 Danet. And Tiberiu Danet went by the nicknames AmightySA

1 and Romeo, but all these communication between these three
2 were encrypted or locked. It wasn't viewable, not to the
3 FBI, not to the RNP. Nobody could break the lock, the
4 encryption lock. So the FBI couldn't determine what they
15:34:05 5 were talking about; just that they were talking constantly
6 to each other.

7 And that's when Mistake 2 came into play. And this
8 one took place two years later on May 14th, 2015. And on
9 that day, Tiberiu Danet traveled to Miami, Florida, to visit
15:34:30 10 friends.

11 Now, while he was going through US Customs, the FBI
12 was able to execute a search warrant and secretly review his
13 cellphone. And for the first time on the cellphone, the FBI
14 found unencrypted, or readable communications, between these
15:34:54 15 three individuals. And the FBI saw chats in which these men
16 were discussing specific and unique computer files that they
17 had created in order to commit these crimes.

18 And you'll see these communications, and you'll learn
19 about what they mean, and how they established this crime.
15:35:17 20 So the FBI knew they had their men at this point.

21 You'll learn that on September 28, 2016, Special
22 Agents Diaz and MacFarlane and a number of other FBI agents
23 went to Romania and worked with the Romanian National Police
24 to arrest these three men. And you'll learn that while the
15:35:43 25 FBI was arresting these three, they were watching their

1 criminal e-mail accounts, and the FBI saw that they were
2 still sending encrypted e-mails to each other many times a
3 day. Constantly. But, the moment they were arrested, they
4 stopped sending or receiving e-mails. When Nicolescu was
15:36:04 5 arrested, MasterFraud stopped sending e-mails. When Miclaus
6 was arrested, his account stopped sending e-mails. And
7 after these three were arrested, their botnet stopped. The
8 infected computers stopped receiving any commands.

9 Now in Romania, the Romanian National Police was able
15:36:31 10 to seize the Defendants' cellphones and you'll see them.
11 These are two of them right here. This one is Nicolescu's
12 phone, and this one is Miclaus' phone. And the FBI found
13 significant evidence on these phones. For example, you'll
14 learn the FBI found a chat on Miclaus' phone between him and
15:37:01 15 Nicolescu, between these two, in which they actually
16 referred to each other as MasterFraud and Minolta. The
17 Romanian National Police were also able to seize the
18 Defendants' computers, and you'll see these computers as
19 well. These are just some of them.

15:37:18 20 These two here, these are Miclaus' computers. These
21 are laptops. This is one of them. This is another. And to
22 my right over there is a series of computers that were
23 seized from Bogdan Nicolescu's residence, MasterFraud. And
24 I'm not going to try to lift these up. But, these are just
15:37:55 25 some of the computers and digital devices found in Bogdan

1 Nicolescu's residence. And you'll learn that the FBI found
2 a lot of significant evidence on these computers as well.

3 Among other things, the FBI found sophisticated
4 programs that Defendants would use in order to communicate
15:38:17 5 through the infected computers.

6 Now, in order to give you a complete picture of what's
7 going on in this case, we'll be presenting you with two
8 views of the conspiracy. The first view is from the outside
9 looking in. So you're going to hear from law enforcement.

15:38:39 10 You're going to hear from many different members of US law
11 enforcement and at least one member of Romanian law
12 enforcement, who's going to fly over from Romania, and
13 you're going to hear from them as well.

14 You're going to hear from private sector
15:38:52 15 investigators, from a variety of different companies who did
16 just an incredible job researching and investigating these
17 Defendants. And you're going to hear from victims. You're
18 not going to hear from all thousand or thousands of victims.
19 But, you're going to hear from some individual victims and
15:39:10 20 you're going to hear from some corporate victims as well.

21 So you'll have the view from the outside looking in. But,
22 you're also going to get the view from the inside looking
23 out.

24 So you're going to hear from several actual members of
15:39:30 25 Defendants' criminal group. And they're going to testify in

1 great detail as to how they got involved, how the crimes
2 were, what everyone's role was, what everyone's moniker was,
3 how much money did they make, all the details.

4 And you're also going to get the inside view from the
15:39:52 5 physical evidence because you are going to see the evidence
6 taken directly from Defendants' personal phones and from
7 their personal computers.

8 Now, the indictment is 21 counts. It is a lengthy
9 indictment because these gentlemen committed crimes for nine
15:40:10 10 years, for more than nine years. It's a lengthy indictment
11 but the indictment is easily summarized.

12 The indictment alleges the conspiracy. And what a
13 conspiracy is, is just a couple of people, more than one
14 person working together as a group to commit a criminal
15:40:31 15 objective, just cooperating to commit crimes. That's all
16 that it is.

17 And the indictment alleges a conspiracy to commit five
18 basic crimes. The first one is wire fraud. What is wire
19 fraud? Basically tricking people online, tricking them to
15:40:48 20 click on an attachment, getting a virus, tricking them into
21 giving their credit card number, tricking them into giving
22 their user name and password, tricking them. Wire fraud.

23 The second count, second series of crimes they're
24 charged with is computer fraud and abuse act. What's that?
15:41:04 25 That is just infecting people with their virus, infecting

1 people with their virus and making their computers do work
2 for them. That's a computer fraud and abuse act.

3 And we have aggravated identity theft, and that's --
4 that's just taking people's credit card information and
15:41:22 5 their account information, taking their identity by taking
6 their computer, their credit card account information.

7 And we have trademark offenses because as you've seen,
8 and as you will see, the Defendants used the logos of lots
9 of companies that we all trust in order to trick people,
15:41:42 10 companies like Western Union, Google, Yahoo, Facebook, eBay.
11 The list goes on and on. So that's where the trademark
12 offenses come in.

13 And finally, money laundering. Hiding millions of
14 dollars stolen from innocent victims.

15:42:01 15 The trial is going to be like a puzzle, a puzzle with
16 many pieces, and each witness is going to provide a couple
17 little pieces of the puzzle, a couple little pieces from
18 each witness.

19 Now some of those pieces might be technical, some of
15:42:19 20 them might be a little complex but that's okay. That's
21 okay. We'll work through that together. Don't worry about
22 it.

23 And the other -- the other way is like a puzzle, in
24 that no one piece tells the whole story. No one witness, no
15:42:35 25 one part of the testimony is going to tell the whole story.

1 For example, the victims, the victims don't know who
2 victimized them. They only know they were victimized. But
3 by the end, you will see the entire puzzle and it will be
4 crystal clear.

15:42:52 5 400,000 infected computers causing innocent people to
6 lose millions of dollars. Nine years of investigations.
7 And two mistakes. And you will find that Defendants are
8 guilty as charged.

9 Thank you very much.

15:43:23 10 THE COURT: On behalf of Defendant Bogdan
11 Nicolescu, Mr. Michael Goldberg.

12 MR. GOLDBERG: Thank you, your Honor.

13 OPENING STATEMENTS ON BEHALF OF THE BOGDAN NICOLESCU

14 MR. GOLDBERG: Ladies and gentlemen, in some
15 of those puzzle pieces will be straight out lies from people
16 that are being flown in from Romania, from people that are
17 -- at least one person who was charged in this case, who is
18 going to make a great deal to point the finger at my client
19 and say he's guilty, he's MasterFraud. And you're going to
15:43:51 20 hear the details of that deal, and you're going to see that
21 that puzzle piece isn't going to fit.

22 Now, I agree this case is about three numbers. The
23 first number is practical infinity because that's the amount
24 of data that the FBI and the Romanian National Police were
15:44:12 25 able to gather in this investigation over nine years. If

1 they printed it all out, it would fill probably this entire
2 building, maybe this whole block. So practical infinity is
3 Number 1.

4 Number 2 is zero. That's the physical link between
15:44:27 5 that data and the name MasterFraud and my client; the data
6 link or the physical link between the evidence they have,
7 the practical infinity, and my client as MasterFraud.
8 There's not one file in any computer that was seized from my
9 client that links to the name MasterFraud.

15:44:53 10 And the last number is "1" because all the
11 Government's eggs are in that basket proving that
12 Mr. Nicolescu is MasterFraud.

13 Yes, they're going to have some circumstantial proof
14 or circumstantial evidence. Well, MasterFraud stopped
15:45:13 15 sending e-mails when Mr. Nicolescu was arrested. Well,
16 there were lots of other people arrested, too, and other
17 people who weren't arrested who knew that those guys were
18 arrested. So that proves nothing. That's how the
19 Government's whole case is going to be. They're going to
15:45:29 20 take an ocean of data and make you look at it through a pin
21 hole. That's what that is.

22 Here's what we don't contest. There was a botnet that
23 was created that was put on the Internet. People were hurt
24 by it, and computers were infected. Trademarks were used
15:45:49 25 illegally. What we do contest is my client's involvement.

1 He knew some of these Defendants, but he wasn't MasterFraud
2 and he's not MasterFraud. He's not guilty because all of
3 their eggs are in that basket.

4 The evidence is going to show that everything
15:46:14 5 Mr. Danet says was paid for by the Government and their
6 currency, which is time. How much time is he going to do in
7 prison? How much time is he not going to have to do in
8 prison if he comes in here and says what the Government
9 wants him to say? That's Number 1.

15:46:29 10 The evidence will show that there is no forensic
11 footprint for any particular person doing any action on the
12 spot. In other words, this botnet could be accessed from
13 numerous, we call them vectors, but from numerous machines.
14 Anybody on this jury, if they knew the log in and the screen
15:47:04 15 name ID, could log in and pick any action they wanted on one
16 of these servers or even the e-mail accounts.

17 For instance, MasterFraud. If somebody else knew the
18 name MasterFraud and the log in ID, they could log in as
19 MasterFraud and send e-mails. It proves nothing. It proves
15:47:25 20 nothing.

21 The Government is going to bring in a parade of data,
22 people, experts, and computers, and definitely be able to
23 show there was this thing that was going on, this criminal
24 enterprise. But, that's not the case against my client,
15:48:02 25 Mr. Nicolescu. The case against my client, Mr. Nicolescu,

1 has to prove beyond a reasonable doubt that he's
2 MasterFraud. And they -- they can't do that. They can't
3 show from these computers. They can't show from any digital
4 pathway or fingerprint or anything physical. The only thing
15:48:20 5 they're going to show you are questionable screenshots of
6 text messages that could have come from anywhere. And when
7 we drill down and we talk about where the text messages came
8 from, who had accesses to the text messaging accounts,
9 you're going to see that the Government's case is looking
15:48:42 10 through a pin hole.

11 Another thing they're not going to show you is
12 anything that Mr. Nicolescu acquired or money that he may
13 have had as a result of any of this. They can't link him to
14 any of the money. Nothing. They search his house, they
15:48:58 15 found yeah, a thousand dollars or something, a couple
16 thousand dollars. Nothing.

17 So after nine years, ten years, with the cooperation
18 of the Romanian National Police -- who, by the way, couldn't
19 tell because the two Defendants in this case, they share an
15:49:19 20 apartment. They're definitely linked. They went to school
21 together, but they couldn't tell who was on the Internet
22 when. How do you build a case like that? How do you come
23 into federal court and say convict this guy? You don't even
24 know who's on the Internet? They're going to try to
15:49:34 25 convince you that all of this information and all this data

1 points only to Nicolescu as MasterFraud and it's not true.

2 You'll hear the evidence. Judge for yourself. You'll
3 hear what the Romanian members of this conspiracy have to
4 say, and you'll decide whether you can believe beyond a
15:49:56 5 reasonable doubt.

6 I believe after you've heard everything, you'll see
7 that this case is not the case that's presented by the
8 Government, and it's questionable from all sides.

9 Thank you.

15:50:07 10 THE COURT: On behalf of Defendant, Radu
11 Miclaus, Mr. Michael O'Shea.

12 MR. O'SHEA: Thank you, your Honor.

13 OPENING STATEMENTS ON BEHALF OF RADU MICLAUS

14 MR. O'SHEA: I made a big deal about it
15:50:18 15 already, I'll make a big deal about it in my opening
16 statement, and I'll make a big deal about it in my closing
17 statement.

18 What am I going to make a big deal about? This thing
19 I talked about a lot during jury selection called the oath.

15:50:31 20 You will take an oath, or you've taken an oath, quite
21 frankly, to apply the law as the Judge gives it. No matter
22 what your personal feelings are, what your personal
23 experiences have been, what your personal feelings might be
24 towards eastern European people, Romanians, Internet
15:50:54 25 fraudsters, ID theft, thieves, money laundering or anything

1 else, and your oath is to follow the facts that are
2 presented in this courtroom and apply the law that the Judge
3 gives you.

4 That's it. And I'm going to hold you as American
15:51:11 5 citizens to your oath. If you want to show Romania
6 anything, you'll show that our office means something, no
7 matter what the facts are, how egregious we might feel about
8 certain things, that our oath matters. This case is going
9 to be a lot more, I mean a lot more about quantity rather
15:51:36 10 than quality. I think Mr. Goldberg touched on that a little
11 bit already.

12 I think that at the end of the day, you may be
13 presented with as many a 1000, 2000 pieces of evidence or
14 exhibits. Not just these bad boys here, but lots of
15:51:53 15 evidence. It's like lots of grains of sand, folks, that
16 don't weigh very much.

17 So when you hear the evidence in this case, I want you
18 to constantly think of quantity versus quality because they
19 are not the same. Sometimes you're going to have a
16:03:13 20 Government standing right out there that says, "There's the
21 guy that robbed the bank sitting there. I saw him. I grew
22 up with him." You're not going to have anything like that.

23 So I'm just going to ask you to consider the oath, the
24 quantity and quality.

15:52:24 25 Now, on that same note, you're going to hear evidence

1 that these two gentlemen and their group back in Romania,
2 they know each other, that they have associated with one
3 another. But, there's going to be a lot of insinuation that
4 just because someone associates with, or is a friend with,
15:52:56 5 somebody or a group that might have been involved with some
6 type of activity, that that's a, quote, conspiracy. That
7 they're involved with this, that the friend group is no
8 longer a friend group, that the associate group is no longer
9 an associate group. It's now a conspiracy.

15:53:11 10 You're going to get a definition during the jury
11 instruction phase of this case about what constitutes
12 conspiracy and the definition of them. And I submit to you
13 that just because someone's a part of a group of people that
14 socialize like the show friends, they all kind of live in
15:53:26 15 the same apartment or apartments across the hall, Joey did
16 something wrong, then they're all guilty, that's going to be
17 the Government's theory in this case. How could they not
18 know? That will be it.

19 As I think the Prosecution has already indicated,
15:53:46 20 there's 21 counts in this case. Count 1 is this wire fraud
21 conspiracy but Count 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and
22 13 all involve, as I understand it so far, each one is
23 representing a separate eBay alleged fraud or wire fraud.
24 You have to find -- you don't have to find people guilty or
15:54:19 25 not guilty of any or all of them. It's not all a group, but

1 you have to separately analyze each of those 13 counts and
2 hold the Government to its burden of proving all the
3 elements in each of those counts.

4 For instance, you can't say well I got a -- there's
15:54:40 5 this one thing that I feel good about. The other I don't.
6 But, you know, if he's -- they've proven Count 3, they've --
7 you know, we're going to give them the mulligan on Count 6
8 and 7. You can't do it. Each count must be separately
9 assessed and analyzed from the evidence that comes in this
15:54:58 10 room. Stuff here, witnesses that testify here, not the gut,
11 not insinuations.

12 Now there's also the separate count, Count 14,
13 computer fraud; again, conspiracy, allegation that somebody
14 accessed or damaged computers of people. I think they're
15:55:20 15 going to talk approximately about, you know, a number of
16 people who claim their computers were infected. You've got
17 this Count 15 on the -- which involves trademarks, and you
18 got Count 16, 17, 18, 19, and 20; again, identity thefts.
19 Again, using the same analysis that I just talked about
15:55:41 20 before, you have to identify each count, hold the Government
21 to its burden of proof as to each of those counts, all the
22 elements in those counts and those elements will be given to
23 you by the Judge during the jury instructions phase.

24 There's also this count involving money laundering.
15:55:59 25 That's Count 21, ladies and gentlemen. And again, that

1 count kind of is like a lone wolf. Doesn't have any
2 duplicity in it with other counts. Again, you'll have to
3 assess that count and all the elements in each element of
4 that count. You've got to find guilt beyond a reasonable
15:56:18 5 doubt. Each of them.

6 Now let's talk about reasonable doubt very quickly,
7 folks. And then I'm pretty close to being done.

8 I went over to some degree during jury selection this
9 doctrine of the jury instructions and what reasonable doubt
15:56:41 10 is. Now part of the definition that you will hear says that
11 reasonable doubt involves assessing this case in this
12 courtroom with this evidence, as you would the most
13 important decisions in your own lives.

14 And you think about that. And as you're hearing the
15:57:04 15 evidence of this case, the lens, the optics that I ask you
16 based upon those jury instructions is to look at them from a
17 burden of proof standpoint and say what are the most
18 important decisions in your own lives. What you had for
19 breakfast? Nope. Maybe what car you bought? I don't think
15:57:24 20 so. How about who you marry? Where you put your retirement
21 funds? Who's going to be the medical entity or person that
22 does that very serious life-saving surgery on yourself or
23 some of your loved ones?

24 Those are the most important decisions in your life,
15:57:45 25 and the Government will ask you to find these gentlemen,

1 including my client, guilty based upon that optic. Think
2 about that. Put on those glasses, most important of your
3 own affairs, own decisions in your life, and analyze that
4 case, this case using those opportunities, not because I'm
15:58:06 5 telling you to because you took that oath to follow those
6 instructions to do so.

7 At the end of the day, folks, this case is a lot like,
8 you know -- it's like a fingerprint case. They're going to
9 claim by analogy that these and the thousands of documents
15:58:30 10 that we'll see are like the ridges in a fingerprint. And
11 they're going to say that there's enough points of
12 comparison out there to prove this identification because
13 you'll see that there's no comparison here. That these
14 pieces of evidence, these thousands of pieces of grains of
15:58:54 15 sand documents, they do not make up a good fingerprint.
16 They just don't.

17 So all I'm going to ask you to do is think of your
18 oath. I'm asking you to think of the definition of
19 reasonable doubt, and I'm going to ask you to think of
15:59:11 20 fingerprints.

21 And last, as I think we pointed out already during
22 jury selection, there are two Defendants here. Each has
23 their own lawyer. Mr. Nicolescu has a very fine lawyer,
24 Mr. Goldberg. I'm going to help out Mr. Miclaus. Each of
15:59:29 25 these guys is on trial here. Even though they're sitting

1 next to one another, folks, you must analyze the evidence as
2 it applies to each count, to each guy separately,
3 individually. That's quantitatively not going to be any
4 task. But, it's part of your oath. You took the oath to do
15:59:53 5 it. So I'm going to hold you to your oath. When you raised
6 your hand and said, "I'll do it," I'm going to hold you to
7 it. Not because it's my personal opinion, but because it's
8 the law. And that's what this courtroom is all about.

9 Thank you.

16:00:12 10 THE COURT: Side bar, counsel, please.

11 (Discussion at side bar off the record.)

12 THE COURT: Ladies and gentlemen it's about
13 4:00. We're going to go for just one more hour or so and
14 start some testimony. Please call your first witness.

16:02:51 15 MR. LEVINE: The Government calls Special
16 Agent Stacy Diaz.

17 THE COURT: And, ma'am, if you would please
18 step up to the podium. And if you would please raise your
19 right hand.

20

21

22

23

24

25

Diaz - Direct/Levine

1 STACY DIAZ,
2 of lawful age, a witness called by the GOVERNMENT,
3 being first duly sworn, was examined
4 and testified as follows:

16:03:07 5 DIRECT EXAMINATION OF STACY DIAZ

6 BY MR. LEVINE:

7 Q. Good afternoon.

8 A. Good afternoon.

9 Q. Would you please state and spell your last name for
16:03:37 10 the record.

11 A. Stacy Diaz, S-T-A-C-Y, D-I-A-Z.

12 Q. And, Special Agent Diaz, what do you do?

13 A. I'm a Special Agent with the FBI.

14 Q. And Special Agent Diaz, have you served as one of the
16:03:51 15 primary FBI case agents investigating Nicolescu and Miclaus
16 and their criminal group?

17 A. Yes, I have.

18 Q. All right.

19 I want to go through your background briefly but
16:04:03 20 first, did you change your name during the course of this
21 case?

22 A. Yes, I did.

23 Q. And what was your name during the investigation of the
24 Miclaus and Nicolescu Group?

16:04:14 25 A. It was Stacy Lough, L-O-U-G-H.

Diaz - Direct/Levine

1 Q. And what caused you to change your name?

2 A. I was recently married.

3 Q. All right. Congratulations.

4 A. Thank you.

16:04:23 5 Q. Did you happen to marry someone who was also involved
6 in this case?

7 A. Yes, I did.

8 Q. All right. Who did you marry?

9 A. He is a computer forensics examiner with the FBI. His
16:04:35 10 name is Yohel Diaz.

11 Q. Okay.

12 And at a general level, what was Yohel Diaz's role in
13 this case?

14 A. He helped to examine and view forensics examination of
16:04:48 15 some of the phones and computers involved in this
16 investigation.

17 Q. All right.

18 And did your relationship with Computer Examiner Diaz
19 develop in part as a result of this case?

16:04:58 20 A. Yes, it did.

21 Q. Congratulations.

22 A. Thank you.

23 Q. Would your relationship with Computer Examiner Diaz
24 impact your testimony here today?

16:05:09 25 A. No, of course not.

Diaz - Direct/Levine

1 Q. All right. So I want to go through your background
2 briefly.

3 What is your educational background?

4 A. I have a bachelor's degree in computer and information
16:05:21 5 science from the University of Maryland.

6 Q. And were you employed while you were in college?

7 A. Yes, I was.

8 Q. How so?

9 A. I was in the United States Air Force for four years.

16:05:33 10 Q. Active duty?

11 A. Yes.

12 Q. And what did you do at the Air Force?

13 A. I was a computer programmer. I was stationed at the
14 Pentagon.

16:05:41 15 Q. How long -- did you say you were with the Air Force
16 for four years?

17 A. Yes.

18 Q. Thank you for your service.

19 A. Thank you.

16:05:46 20 Q. What did you do after your service with the Air Force?

21 A. I worked as a Government contractor in the D.C. area
22 for approximately five years before joining the FBI.

23 Q. Where were you working as a Government contractor?

24 A. Fort Meade, Maryland.

16:06:01 25 Q. And what did you do as a general contractor?

Diaz - Direct/Levine

1 **A.** I helped to manage a team that was responsible for
2 developing online content for an army school, so I developed
3 web pages as well as directed the rest of the team.

4 **Q.** How long were you at Fort Meade?

16:06:20 5 **A.** Approximately five years.

6 **Q.** And when did you join the FBI?

7 **A.** In 2006.

8 **Q.** And so have you been with the FBI for 13 years now?

9 **A.** Yes.

16:06:28 10 **Q.** And during that entire time, have you always been a
11 Special Agent?

12 **A.** Yes, I have.

13 **Q.** What does it mean to be a Special Agent with the FBI?

14 **A.** A Special Agent is basically the investigators that
16:06:42 15 work for the FBI. The FBI has many different positions.
16 The Special Agent is the overall investigator of a case.

17 **Q.** All right.

18 And what happens if you find evidence that a
19 particular person committed a crime? What happens then?

16:07:01 20 **A.** Then we would open an investigation and begin
21 investigating that crime.

22 **Q.** Do you decide whether a particular person gets
23 prosecuted or not?

24 **A.** No, I do not.

16:07:11 25 **Q.** Okay. Who makes that decision?

Diaz - Direct/Levine

1 **A.** The Assistant Prosecutors that would then prosecute
2 the case.

3 **Q.** So the United States Attorney's Office?

4 **A.** Yes.

16:07:20 5 **Q.** Which field office of the FBI do you work from?

6 **A.** The Cleveland office.

7 **Q.** And have you worked with the Cleveland office during
8 your entire 13 years with the FBI?

9 **A.** Yes, I have.

16:07:30 10 **Q.** Within Cleveland FBI, what different squads have you
11 worked on?

12 **A.** I was on two different squads. The first six years
13 that I was in Cleveland, I was assigned to the Cyber Squad,
14 and then I was transferred to the Organized Crime Squad for
16:07:47 15 the last seven years. But, I was working cyber organized
16 crime.

17 **Q.** Okay. So that actually gets to my next question.

18 You spent a significant amount of time investigating
19 both cyber crime and organized crime. Do you find there's
16:08:01 20 an overlap between those two areas?

21 **A.** Yes, definitely.

22 **Q.** How so?

23 **A.** In today's day and age with many crimes being
24 committed over computers and over the Internet, many cyber
16:08:13 25 criminals now work in groups. And so organized crime is

Diaz - Direct/Levine

1 simply investigating a group of people working together. So
2 if there's a group of people working to commit cyber crimes
3 on computers or on the Internet, then that would be cyber
4 organized crime.

16:08:28 5 **Q.** In addition to working on the Cyber Squad and the
6 organized crime squad, are you also a member of Cleveland
7 FBI's Emergency Response Team?

8 **A.** Yes, I am.

9 **Q.** And what do you do as a member of the FBI Response
16:08:42 10 Team?

11 **A.** The Emergency Response Team is a -- a voluntary extra
12 duty that we perform for the FBI, and we're a team. Each
13 division has their own team. So I'm on the Cleveland ERT
14 team. And we are called out to help assist processing crime
16:09:01 15 scenes. So it could be a simple crime scene involving
16 collecting documents or it could be a very complex crime
17 scene that could be a physical traumatic crime, such as a
18 murder where we're collecting different types of evidence.

19 An example of one crime scene that I responded to on
16:09:23 20 the Cleveland Air T team some of you may be familiar with is
21 the Ariel Castro house where the three girls were found and
22 recovered from; Amanda Berry, Gina DeJesus, and Michelle
23 Knight.

24 **Q.** Thank you for working on that.

16:09:39 25 In your capacity as FBI Special Agent, what types of

Diaz - Direct/Levine

1 cyber-related cases have you investigated?

2 **A.** I have worked a variety of cyber cases, including
3 computer intrusions into bank accounts, online fraud cases,
4 and child pornography cases, and specifically, online option
16:10:03 5 fraud cases.

6 **Q.** Okay.

7 Have you also dealt with cyber terrorism online?

8 **A.** Yes, I have.

9 **Q.** And in your capacity on the Cyber Squad, have you
16:10:12 10 dealt with Romanian organized cyber crime?

11 **A.** Yes, I have.

12 **Q.** Approximately what percentage of your time over the
13 last 13 years would you say have you spent investigating
14 Romanian cyber crime?

16:10:24 15 **A.** I would say approximately 75 to 80 percent of my time
16 has been on Romanian cyber organized crime.

17 **Q.** Okay. And does that include other investigations
18 besides the Bayrob Group?

19 **A.** Yes, it does.

16:10:37 20 **Q.** As part of your work with Romanian cyber crime, have
21 you ever spent an extended period of time in Romania?

22 **A.** Yes, I have.

23 **Q.** How long did you spend in Romania?

24 **A.** I've been to Romania on many smaller trips for one
16:10:53 25 week or two weeks at a time, and then one time, I spent a

Diaz - Direct/Levine

1 period of two months staying in Romania in 2009.

2 **Q.** What were you doing during those two months?

3 **A.** I was working at the US Embassy as well as working
4 everyday with the Romanian National Police, the RNP. I
16:11:11 5 would work at their headquarters building in Bucharest.

6 **Q.** And the RNP is what again?

7 **A.** The Romanian National Police.

8 **Q.** And during those two months, did you work closely with
9 the Romanian National Police or were you off doing separate
16:11:24 10 things?

11 **A.** I worked with them everyday.

12 **Q.** And when you were working with the Romanian National
13 Police, were you frequently working with them in RNP
14 offices?

16:11:32 15 **A.** Yes, I was.

16 **Q.** Now besides those two months, how many other times
17 would you estimate you visited Romania as part of your work
18 with the FBI?

19 **A.** I think total, including those two months, I have been
16:11:43 20 there approximately 15 times.

21 **Q.** Okay.

22 And during all of these visits, were you meeting with
23 and working with the Romanian National Police and with
24 Romania Prosecutors?

16:11:55 25 **A.** Yes.

Diaz - Direct/Levine

1 Q. So having worked closely with the Romanian National
2 Police and Romania Prosecutors, how would you say those
3 organizations compare with the FBI?

4 MR. GOLDBERG: Objection.

16:12:04 5 MR. O'SHEA: Objection.

6 THE COURT: Sustained.

7 Q. Okay.

8 What has your experience been working with the
9 Romanian National Police?

16:12:11 10 A. It has been very positive. We work very closely
11 together and work very well. I believe that they are
12 comparable to the FBI.

13 Q. Have you testified in state or federal court before?

14 A. Yes, I have.

16:12:26 15 Q. How many times have you testified in state or federal
16 court?

17 A. Approximately ten to 12 times.

18 Q. And are you certified to teach any law enforcement
19 courses?

16:12:39 20 A. Yes, I am.

21 Q. What courses?

22 A. I am certified to teach courses related to evidence
23 response, related to the evidence response team, and I am
24 also certified to teach organized crime cases -- classes;
16:12:55 25 specifically, cyber organize crime classes.

Diaz - Direct/Levine

1 Q. And have you conducted trainings in both of those
2 areas?

3 A. Yes, I have.

4 Q. Have you conducted any trainings for international law
16:13:05 5 enforcement?

6 A. Yes, I have.

7 Q. What trainings have you conducted for international
8 law enforcement?

9 A. I have taught at the International Law Enforcement

16:13:13 10 Academy, otherwise known as ILEA in Budapest, Hungary. I
11 taught cyber organized crime class for a week there. I've
12 also taught at the Latin American Law Enforcement Academy,
13 also referred to as LA-LEADS, in which I also again taught
14 cyber organized crime.

16:13:34 15 Q. And were any Romania Government officials present for
16 either training?

17 A. Yes, there were.

18 Q. Can you elaborate?

19 A. Yes.

16:13:41 20 At the ILEA course in Budapest, Hungary, there were
21 approximately 30 Romanian National Police officers there.

22 Q. Okay.

23 As part of your job, do you also regularly attend
24 trainings related to investigating cyber crime?

16:13:57 25 A. Yes, I do.

Diaz - Direct/Levine

1 Q. All right.

2 So now I want to move from your background and turn to
3 this actual investigation. So Special Agent Diaz, when did
4 you begin personally investigating Nicolescu's and Miclaus'
16:14:11 5 group?

6 A. In October 2007.

7 Q. And just before we get any further, is there a name
8 that the FBI uses to refer to Nicolescu and Miclaus'
9 criminal group?

16:14:22 10 A. Yes.

11 Q. Where does that name come from? First of all, what is
12 that name?

13 A. We usually refer to them as the Bayrob Group.

14 Q. Okay. And now, let me ask, where does the Bayrob
16:14:32 15 Group, where does that name come from?

16 A. The virus that they wrote and used was named by
17 industry investigators, and it was named as the Bayrob
18 Trojan; therefore, we named the group the Bayrob Group off
19 of the name of the virus that they used.

16:14:49 20 Q. Okay. You used the word Trojan. What is a Trojan?

21 A. A Trojan is a type of virus that can infect a
22 computer.

23 Q. Okay. What -- what makes it different than any other
24 virus?

16:15:01 25 A. It's generally a virus that is installed without your

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1 knowledge. You think that you are installing something
2 simple. Maybe you decide to install a game on your computer
3 that you can play, and without your knowledge, it's actually
4 installing a separate software package, which is the virus.
16:15:24 5 So it installs the game and then secretly installs something
6 else, which is the Trojan.

7 **Q.** So in that example, the game is sort of like a Trojan
8 horse?

9 **A.** Yes, it is.

16:15:34 10 **Q.** And is that -- is that where the term Trojan comes
11 from?

12 **A.** Yes.

13 **Q.** Okay. All right.

14 So what caused you to begin investigating Bayrob Group
16:15:45 15 in 2007?

16 **A.** At the FBI, we have complaint duty that all agents
17 have to fulfill at least one day throughout the year.

18 And on complaint duty, we have to answer phone calls
19 and talk to people that call in with a complaint or we have
16:16:03 20 to interview people that walk into the office to give us a
21 complaint. And in 2007, I happen to be on complaint duty
22 one day in October.

23 **Q.** Okay. And what happened on that day?

24 **A.** The first victim the FBI is aware of, Yvonne Liddy,
16:16:20 25 called me at the FBI office that day.

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1 Q. Okay.

2 And Ms. Liddy will be testifying later, but at a
3 general level, what was the nature of Ms. Liddy's initial
4 complaint?

16:16:31 5 MR. O'SHEA: Objection.

6 THE COURT: Overruled. You may tell us the
7 nature.

8 THE WITNESS: When she first called the FBI
9 office in October of 2007, she was complaining about the
16:16:42 10 fact that she had bid on a computer -- sorry, on a car on
11 eBay, attempting to purchase this vehicle. She had bid on
12 the car and had won the auction, and then she had sent the
13 money.

14 MR. O'SHEA: Objection.

16:16:57 15 THE COURT: Okay. It's sustained.

16 BY MR. LEVINE:

17 Q. Okay.

18 So at a more general level, can you just sort of tell
19 us what the overall nature is without going through every
16:17:08 20 step of it?

21 A. Yes, she had been a victim of online auction fraud on
22 eBay.

23 Q. Okay. What does online auction fraud mean to you?

24 A. Online auction fraud is generally when an individual
16:17:22 25 will post an auction on eBay or another online auction site,

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1 hoping to sell an item that either doesn't exist at all or
2 they don't have themselves, and they will post this auction
3 and someone will win the auction and send them the money.
4 They get the money but they never actually provide the
16:17:41 5 product that they were supposed to be selling.

6 Q. Okay.

7 And that is commonly referred to as auto auction fraud
8 or online auction fraud?

9 A. Yes.

16:17:52 10 Q. Okay.

11 And is that criminal scheme you just described, eBay
12 auction fraud, or auto auction fraud, online auction fraud,
13 is that a criminal scheme that's unique to the Bayrob Group
14 or is it a scheme that other criminals engaged in?

16:18:09 15 A. No, it's not unique to the Bayrob Group. It's
16 definitely a scream that other criminals engage in as well.

17 Q. Now did Yvonne Liddy's initial complaint cause you to
18 open up an investigation?

19 A. No, it do not.

16:18:22 20 Q. Did you have a second conversation with Ms. Liddy?

21 A. Yes, I did.

22 Q. And at a general level, what was that conversation
23 about?

24 A. Ms. Liddy called back to tell me that she had --

16:18:34 25 MR. GOLDBERG: Objection.

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1 THE COURT: Sustained.

2 BY MR. LEVINE:

3 Q. Without going into the details of the conversation,
4 what was the ultimate conclusion of that conversation that
16:18:45 5 caused you to take further investigative action?

6 A. Ms. Liddy's computer had been infected with a virus.

7 Q. Okay.

8 And upon learning that, what did you do next?

9 A. I made an arrangement to visit her house, and I took
16:19:04 10 one of the computer forensics analysts from the FBI office
11 with me to go out and look at her computer.

12 Q. Okay. And what was the result of that analysis?

13 A. We were able to determine that her computer was in
14 fact infected with the Bayrob Trojan. We actually took the
16:19:22 15 computer back to our office to make a copy of it. And I
16 ended up opening the investigation.

17 Q. Okay.

18 So were you the only Special Agent investigating the
19 Bayrob Trojan in 2007?

16:19:34 20 A. Yes, I was.

21 Q. And have you been investigating the Bayrob Group ever
22 since?

23 A. Yes.

24 Q. So how long were you investigating the Bayrob Group
16:19:42 25 before the arrest of these Defendants?

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1 **A.** Approximately nine years.

2 **Q.** Okay.

3 And during those nine years, roughly, how many search
4 warrants, subpoenas, other legal process did you obtain as
16:19:53 5 part of your investigation?

6 **A.** There was hundreds of different legal process.

7 **Q.** And besides Yvonne Liddy, as part of your
8 investigation, were you able to identify other US victims of
9 the Bayrob Group's eBay fraud?

16:20:07 10 **A.** Yes.

11 **Q.** How far -- roughly how many individual victims of the
12 Bayrob Group's eBay fraud were you able to identify through
13 the course of your investigation?

14 **A.** There were hundreds of US victims of the online
16:20:19 15 auction fraud by the Bayrob Group.

16 **Q.** Okay.

17 And in general, what methods do you use to identify
18 victims of the Bayrob Group's eBay fraud?

19 **A.** There were multiple different ways of identifying
16:20:33 20 victims. One way would be bank records. If I spoke with a
21 victim, I would find out where they transferred the money
22 to, and I would get records from that particular bank
23 account. And then analyzing that bank account, I might see
24 that they got four or five other transactions into that bank
16:20:52 25 account, that I would then know what was also associated

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1 with the Bayrob Group.

2 I also did searches on IC3.

3 **Q.** What is IC3?

16:21:06

4 **A.** IC3 is the Internet Crime Complaint Center. It is an
5 organization that works with the FBI. There's a website
6 associated with it named IC3.gov, and what it is it's there
7 for victims of any type of cyber crime can go to that
8 website and fill out a complaint form, documenting what
9 happened to them so that law enforcement can then access
10 those records.

16:21:25

11 **Q.** Okay.

12 So you talked about IC3 as one source of information
13 about victims to help identify them. You talked about bank
14 accounts. What other general ways do you use to identify
15 victims?

16:21:41

16 **A.** A service that was used to communicate with victims of
17 the Bayrob Group was known as Read Notify and so we were:
18 Able to get records from Read Notify and analyze e-mails
19 that went through the Read Notify server. And based on
20 those e-mails, the analysis of those e-mails, we identified:
21 More victims and more money mules associated with the Bayrob
22 Group.

16:21:59

23 **Q.** Okay.

24 And eventually, were you able to identify command and
25 control servers associated with the Bayrob Group?

16:22:12

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1 **A.** Yes.

2 Servers that were used to control the Bayrob infected
3 computers, the Bayrob botnet, we were able to identify the
4 servers. And on those servers was records --

16:22:29 5 MR. O'SHEA: Objection.

6 THE COURT: Overruled.

7 THE WITNESS: There were records on the
8 servers of victims that had been victimized by the Bayrob
9 Group.

16:22:36 10 MR. O'SHEA: Objection again, your Honor.

11 THE COURT: That answer will stand.

12 BY MR. LEVINE:

13 **Q.** Okay.

14 So let's go through some of these -- you talked about
16:22:44 15 four general methods of identifying victims; IC3, bank
16 accounts, Read Notify, and the Command and Control Servers.
17 So let's go through each of these in a little bit more
18 detail.

19 Tell me what is IC3?

16:22:58 20 **A.** IC3 is the Internet Crime Complaint Center.

21 By working with IC3, I can send IC3 a query. I can
22 tell IC3 I would like for them to search for any complaints
23 that involved a particular e-mail address, a name, bank
24 account, anything that would -- I could tee off have to
16:23:22 25 identify victims that would be associated with the Bayrob

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1 Group.

2 They could then search the database and provide all of
3 those complaints back to me.

4 **Q.** Okay.

16:23:30 5 And I am now going to, with the permission from the
6 Judge, from your Honor, to approach. I'm going to show you
7 what has been previously marked as Government's Exhibits
8 1480 to 1679.

9 So I would like you to just take a quick look at
16:24:16 10 Government's Exhibit 1480 to 1679 and let me ask, did you
11 have an opportunity to review these exhibits before coming
12 on to the stand today?

13 **A.** Yes, I did.

14 **Q.** All right.

16:24:25 15 Take a quick look and make sure they're still the
16 right ones there. Let me know when you're satisfied it's
17 what you reviewed earlier.

18 **A.** 1480 through?

19 **Q.** 1480 through 1679. Okay.

16:25:24 20 What is Government's Exhibit 1480 through 1679?

21 **A.** These are all the printouts of the IC3 complaints that
22 are associated with the Bayrob Group.

23 **Q.** Okay. And from whom did you get these IC3 complaints?

24 **A.** Heather Rollins is an individual that works at IC3 who
16:25:43 25 did all the searches for me.

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1 Q. Okay. And do Government's Exhibit 1480 through 1679
2 contain fair and accurate copies of the IC3, IC3 complaints
3 provided to you by Heather Rollins for the Bayrob
4 investigation?

16:26:04 5 A. Yes, they are.

6 Q. Did you personally review these IC3 complaints?

7 A. Yes, I did.

8 Q. So having personally reviewed these IC3 complaints,
9 what type of information did victims include in these IC3
16:26:17 10 forms that helped you determine that they were victims of
11 the Bayrob Group and not victims of someone else doing
12 online fraud?

13 MR. GOLDBERG: Objection.

14 THE COURT: Overruled. Please answer in
16:26:26 15 general terms, ma'am.

16 THE WITNESS: I would look for specific e-mail
17 addresses, specific bank accounts that were used to see, to
18 receive the wire transfers, specific names that they
19 communicated with, and then I would also look for things
16:26:42 20 that were clues to me that they were infected with the
21 Bayrob virus.

22 Q. Okay.

23 Can you give us an example of a clue they were
24 infected with the Bayrob virus?

16:26:53 25 A. Yes. Many of the victims would say things like --

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1 MR. GOLDBERG: Objection.

2 MR. O'SHEA: Objection.

3 THE COURT: Sustained.

4 MR. GOLDBERG: Without saying specifically
16:27:00 5 what the victim said, what would be a clue that they were
6 infected with the Bayrob virus.

7 THE WITNESS: If there was a fake eBay website
8 that was used, if they felt like --

9 MR. GOLDBERG: Objection.

16:27:17 10 THE COURT: Sustained.

11 Q. Without describing how any victim felt, what were the
12 markers that you might look for that would show this was a
13 Bayrob Group victim and not some other victim?

14 A. Right.

16:27:28 15 Essentially, a fake website that they thought was
16 eBay.

17 MR. O'SHEA: Objection.

18 THE WITNESS: That they later determined was
19 not.

16:27:39 20 Q. What about --

21 THE COURT: One moment.

22 Sustained to the last part of that answer. It will be
23 stricken.

24 MR. LEVINE: "That they later determined" --

16:27:48 25 THE COURT: Correct.

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1 MR. LEVINE: Okay.

2 BY MR. LEVINE:

3 Q. What about did -- if you saw indications of a Kodak
4 picture viewer attachment --

16:27:58 5 A. Yes.

6 MR. GOLDBERG: Objection.

7 MR. LEVINE: I didn't finish the question.

8 THE COURT: Let me hear the question, please.

9 BY MR. LEVINE:

16:28:05 10 Q. If there were reports of a use of a Kodak picture
11 viewer, clicking on a Kodak picture viewer, would that to
12 you indicate a sign of the Bayrob Group?

13 A. Yes, it would.

14 MR. GOLDBERG: Objection.

16:28:16 15 THE COURT: Sustained, sustained. Rephrase
16 your question.

17 Q. Were there any other signs that you -- that would help
18 you identify Bayrob Group infection?

19 A. Yes, there was.

16:28:28 20 Q. Can you give me some example -- an example or some?

21 A. There were a couple of different other signs, the
22 Kodak people viewer being one of them. If there was a link
23 that they were provided to look at pictures of the car, or
24 if there was an attachment in an e-mail that they were sent
16:28:49 25 to look at pictures of the car.

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1 Q. Okay.

2 Now, of those victims that made complaints through
3 IC3, roughly, how many were interviewed by you or other
4 members of the FBI?

16:29:02 5 A. There was approximately 40 to 50 victims interviewed.

6 Q. Okay. And this is just from the IC3 population?

7 A. Yes.

8 Q. Okay.

9 So we talked about IC3 as the source for identifying
16:29:18 10 victims. Let's now talk about Read Notify. You mentioned
11 you identified victims through Read Notify. What is Read
12 Notify?

13 A. Read Notify is a service that's available on the
14 Internet, ReadNotify.com. Anyone can sign up and use this
16:29:35 15 service. And what it is, is if you were using Read Notify,
16 you can send e-mails from whatever e-mail account that you
17 use, whether it's Gmail, Yahoo, outlook, whatever you're
18 using, you can send your e-mails through the Read Notify
19 server. And when those e-mails are received on the other
16:29:55 20 end from the person that you're sending to, you would get
21 notifications from Read Notify that the e-mail was received,
22 that it was opened, that it was deleted, that it was
23 forwarded, all different types of information about your
24 e-mail. You would get notifications about.

16:30:13 25 Q. Okay.

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1 And how did you determine that the Bayrob Group was
2 using Read Notify?

3 **A.** I had been given e-mails that a victim had received
4 from a Bayrob Group member who was defrauding them online.
16:30:29 5 By analyzing the e-mail header of the e-mail, I was able to
6 determine that it had come from the Read Notify server.

7 **Q.** And did you get in touch with Read Notify?

8 **A.** Yes, I did.

9 **Q.** And did Read Notify provide you with copies of e-mail
16:30:45 10 correspondence from the Bayrob Group?

11 **A.** Yes, they did.

12 **Q.** All right. I'd like to now bring up what's been
13 previously marked as Government's Exhibit -- okay. So I'm
14 going to bring up to you what has been marked previously
16:31:13 15 Government's Exhibit 1320.

16 Okay. What is Government's Exhibit 1320?

17 **A.** It is a CD.

18 **Q.** Okay. And a CD of what?

19 **A.** It contains all of the e-mails that were provided by
16:31:46 20 Read Notify.

21 **Q.** Okay.

22 And does Government's Exhibit 1320 contain fair and
23 accurate copies of the Bayrob e-mails you received from Read
24 Notify?

16:31:55 25 **A.** Yes, it does.

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1 Q. And did you review these e-mails to determine whether
2 they were actually e-mails to and from the Bayrob Group?

3 A. Yes.

4 Q. And based on your review, were they actually e-mails
16:32:05 5 to and from the Bayrob Group?

6 MR. O'SHEA: Objection.

7 THE COURT: Sustained.

8 BY MR. LEVINE:

9 Q. How did you -- how did you review -- what things did
16:32:16 10 you look for to determine whether they were actually to and
11 from the Bayrob Group?

12 A. All of the e-mails through the Read Notify server are
13 actually e-mails from the Bayrob Group. So this disk would
14 not contain e-mails to the Bayrob Group.

16:32:31 15 And what I would look for were, again, specific e-mail
16 accounts that I knew the Bayrob Group was using, specific
17 names that I knew they were using.

18 MR. O'SHEA: Objection.

19 THE COURT: Overruled.

16:32:44 20 THE WITNESS: Specific bank accounts that I
21 knew to be associated with the Bayrob Group. And then in
22 addition, they would use templates that they would copy and
23 paste into e-mails over and over and over again, sending to
24 hundreds of victims. And so I knew that those were
16:33:01 25 templates that were used by the Bayrob Group.

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1 MR. O'SHEA: I'm going to object, Judge.

2 THE COURT: I'm sorry?

3 MR. O'SHEA: I'm sorry. Again, objection.

4 THE COURT: Overruled. That answer will

16:33:12 5 stand.

6 Q. Okay.

7 So based on that review, did you determine that the
8 e-mails provided by Read Notify were actually e-mails to and
9 from the Bayrob Group?

16:33:21 10 MR. O'SHEA: Objection.

11 THE COURT: Sustained. Based --

12 Q. I'm sorry. You're right.

13 Based on that review, did you determine that the
14 e-mails were actually from the Bayrob Group?

16:33:35 15 MR. O'SHEA: Objection.

16 THE COURT: Overruled.

17 THE WITNESS: Yes, I did.

18 Q. Okay.

19 And approximately how many e-mails are on this CD?

16:33:45 20 A. There are over 19,000 e-mails.

21 Q. Now, are these, to clarify, are these e-mails between
22 members of the Bayrob Group?

23 A. No.

24 Q. Or are they e-mails between a member of the Bayrob
16:33:58 25 Group on one hand and a victim or a money mule on the other

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1 hand?

2 MR. O'SHEA: Objection. Judge, can we
3 approach real quick?

4 THE COURT: You may.

16:34:04 5 MR. O'SHEA: Thank you.

6 (The following proceedings were held at side bar:)

7 THE COURT: Michael, on or off?

8 MR. O'SHEA: On. I'm sorry.

9 THE COURT: Shirle, on.

16:34:24 10 MR. O'SHEA: The one thing I just noticed,
11 it's direct examination, that Brian -- he probably did it
12 involuntarily, but when he said to and from the Bayrob, he
13 pointed at our guys, and that's a leading question. He did
14 it in front of the jury.

16:34:39 15 THE COURT: Well, I sustained his -- your
16 objection. But, honestly, not because I saw him point to
17 your Defendant. I -- if that happened, I just didn't see
18 it. I sustained the objection because she had just
19 testified not "to" but only "from." And that's why I
16:35:00 20 sustained the objection.

21 Go ahead.

22 MR. O'SHEA: Judge, this very second when I
23 stood up and he said the Bayrob Group and pointed at our
24 guy, that's a leading -- sorry. That's a leading question.
16:35:12 25 He's pointing to our clients.

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1 THE COURT: Okay.

2 Well, I'm going to instruct all three of you on the
3 Government's side do not do that, if that occurred. And I
4 don't know if it was done intentionally or not. I'm not
5 even going to make inquiry. From now on, don't do it.

16:35:26

6 MR. O'SHEA: Thank you, Judge.

7 (Proceedings resumed within the hearing of the jury:)

8 BY MR. LEVINE:

9 Q. Thank you, your Honor. Okay.

16:35:49

10 Of those 19,000 e-mails that you reviewed, were they
11 all related to the fraud that we're talking about or any of
12 them just like ordering lunch or something like that?

13 MR. GOLDBERG: Objection.

14 THE COURT: Overruled.

16:36:04

15 THE WITNESS: No, they were all related to the
16 fraud.

17 Q. All right.

18 Now I'm not going to ask you and the jury to go
19 through 19,000 e-mails. I'm sure the Judge will appreciate
20 that. But, I want to ask you about a few of them. And I'd
21 like to ask if you would please do me the kindness of
22 bringing up Government's Exhibit 1324.

16:36:19

23 THE COURT: 1324?

24 MR. LEVINE: Yes.

16:36:34

25 MR. O'SHEA: Judge --

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1 THE COURT: I'm sorry?

2 MR. O'SHEA: Before that's published to the
3 jury, can Mr. Goldberg and I assume he's going to bring it
4 up on the screen and the jury's going to see it now before
16:36:43 5 it's admitted?

6 MR. LEVINE: Not yet.

7 MR. O'SHEA: Well, when you said bring it up,
8 maybe I read you the wrong way.

9 THE COURT: Oh, okay.

16:36:49 10 MR. LEVINE: I'm sorry.

11 THE COURT: Ladies and gentlemen, you cannot
12 see it, correct? There's nothing on your screens? Okay.

13 MR. O'SHEA: I misunderstood.

14 MR. LEVINE: I will ask permission to publish
16:36:59 15 it before it will go to the jury, your Honor.

16 THE COURT: Fair enough.

17 MR. LEVINE: Thank you.

18 BY MR. LEVINE:

19 **Q.** So I show you -- I hope it's on the screen. No, not
16:37:08 20 yet?

21 **A.** No, I don't see anything.

22 THE JURY: It's on our screen.

23 MR. McDONOUGH: Oh, oh.

24 THE COURT: Is it off now?

16:37:35 25 THE JURY: Yes.

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1 THE COURT: Can you see it?

2 THE WITNESS: No.

3 MS. CHANDLER: I took it down. Now I have it
4 back up.

16:37:41 5 MR. LEVINE: We will solve these problems in
6 short.

7 THE COURT: All right. We're good.

8 MR. LEVINE: Okay.

9 Q. Now, at a general level, what is Government's Exhibit
16:37:49 10 1324?

11 A. This is an e-mail provided by Read Notify that was
12 associated with the Bayrob Group.

13 Q. Okay.

14 And is Government's Exhibit 1324 a fair and accurate
16:38:01 15 copy of a Read Notify e-mail as it was produced to you by
16 Read Notify?

17 A. Yes.

18 Q. Okay.

19 MR. LEVINE: And, your Honor, now subject to
16:38:09 20 additional authentication from the owner, operator of Read
21 Notify will be testifying next, although tomorrow likely,
22 and Tiberiu Danet, who will be testifying later, I move to
23 admit Government's Exhibit 1324.

24 MR. O'SHEA: Objection.

16:38:25 25 THE COURT: I think we're going to have to

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1 wait.

2 MR. LEVINE: For -- can we have a side bar,
3 your Honor?

4 THE COURT: On that issue?

16:38:35 5 MR. LEVINE: Yes.

6 THE COURT: Okay.

7 (The following proceedings were held at side bar:)

8 MR. LEVINE: So what is the -- what is the
9 objection?

16:39:01 10 MR. O'SHEA: Let's get a hard copy of that up
11 here so we can look at it.

12 MR. LEVINE: Okay.

13 THE COURT: You just said subject to -- we
14 haven't heard them yet. And I'm assuming that was the
16:39:15 15 ground for objecting.

16 MR. LEVINE: Okay.

17 In chambers at a pretrial conference, we discussed,
18 you suggested a procedure where we would conditionally
19 admit, subject to additional authentication later.

16:39:27 20 THE COURT: Oh -- only if Defense agreed. And
21 I'm hearing they're not.

22 MR. LEVINE: Okay.

23 Well, the problem is we're going to have quite a few
24 witnesses that will provide different authentication --
16:39:39 25 different levels of authentication throughout the trial.

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1 We're doing this with the understanding that if they're
2 ultimately not authenticated, that -- to your satisfaction,
3 then we have a problem. So, but we are putting sort of,
4 based on state -- on Special Agent Diaz's testimony already
16:39:57 5 of how she identified this as a Bayrob -- can you hear me?

6 Based on Special Agent Diaz's testimony already is how
7 she identified this as a Bayrob Group e-mail from Read
8 Notify. Read Notify's going to come testify tomorrow as to
9 how they identified it initially and that it's authentic and
16:40:19 10 I --

11 THE COURT: Let me stop you. I'm going to
12 stop you.

13 I'm confused here. What do you plan on doing with
14 this right now?

16:40:29 15 MR. LEVINE: To ask her some questions based
16 on what she learned from the e-mail.

17 MR. O'SHEA: Okay. I -- Judge, my concern has
18 not really been authentication. It never really has been.
19 It has been about the hearsay. And there are hearsay
16:40:52 20 statements in that e-mail, pure and simple. And we're going
21 to object to the hearsay proffered issues that we talked
22 about probably ad nauseam on brief and publishing it to the
23 jury until a ruling is made relative to the hearsay element
24 of this is not fair because the jurors would have already
16:41:10 25 seen it.

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1 So I think publicizing it too soon is the reason I'm
2 objecting.

3 MR. LEVINE: Can I respond to that?

4 THE COURT: Well, then I have to look at
16:41:21 5 every -- clearly you don't care about conditionally
6 admitting them into evidence. That's what you just said.
7 If you're -- your problem is hearsay. Well, the only way I
8 can make that determination is if I look at every document
9 you want to get into evidence and determine if there's
16:41:40 10 hearsay.

11 MR. LEVINE: Yes.

12 THE COURT: It's as simple as that.

13 MR. LEVINE: Your Honor, these are very simple
14 on hearsay. All of the Read Notify e-mails are from Bayrob.
16:41:49 15 They are all in furtherance of the conspiracy and Special
16 Agent Diaz just testified that, that they all are about the
17 fraud. None of them are about ordering lunch or something
18 different. That's why I asked her that question, to lay the
19 foundation.

16:42:02 20 THE COURT: Well, but you can still have
21 hearsay within a document that you're trying to offer for
22 proof of furtherance of the conspiracy.

23 MR. LEVINE: So what there is is statements in
24 furtherance of the conspiracy, the Bayrob Group statements.
16:42:15 25 And any statements by the victim are not going to go into,

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1 but they're just offered for context.

2 THE COURT: But, Mr. Levine, I'm going to just
3 take your word for it? Don't I have to look at them?

4 MR. LEVINE: You can look at them, yes.

16:42:29 5 THE COURT: I mean I have to.

6 MR. O'SHEA: Judge, may I also say --

7 THE COURT: So I'm going to suggest that you
8 point out specifically to me what hearsay you are objecting
9 to.

16:42:38 10 MR. O'SHEA: I can but, Judge, let me also say
11 that as I understand the coconspirator exception to the
12 hearsay rule, first and foremost, they must establish the
13 existence of the conspiracy. I don't think that they've
14 done that yet so this is premature.

16:42:51 15 Secondly, that statement, that hearsay statement must
16 be in furtherance of the conspiracy. Now I know all they
17 have to do is establish the existence of the conspiracy by
18 the preponderance of the evidence, but this is their first
19 witness. They haven't done that yet. So I think it's
16:43:10 20 premature.

21 And even so, Judge, even if it fits the exceptions
22 that are listed currently in the Federal Rules of Evidence
23 related to hearsay, it may still violate Crawford. I can
24 identify exactly in that particular e-mail that we're
16:43:27 25 talking about where the hearsay statement is.

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1 I don't think -- going back, I don't think they've
2 established a conspiracy yet or our guy is a part of this
3 conspiracy or anything.

4 MR. LEVINE: Your Honor, we addressed these in
16:43:40 5 two or three separate hearsay motions in advance. One
6 specifically on the coconspirators exception, and then the
7 most recent one where we identified all the coconspirators'
8 statements that we wanted to introduce.

9 We presented case law showing the Court can decide in
16:43:55 10 advance of trial that the coconspirator exception applies,
11 subject to establishing the conspiracy through the course of
12 the trial.

13 We obviously believe that we're going to establish the
14 conspiracy.

16:44:07 15 THE COURT: The law is abundantly clear that I
16 can conditionally allow statements in anticipation of proof
17 of a conspiracy, and so I -- that objection is not well
18 taken.

19 MR. LEVINE: And on terms of proffer, the law
16:44:25 20 is also very clear that a statement in furtherance of the
21 conspiracy or a statement of a party opponent is not hearsay
22 and thus does not proffer --

23 THE COURT: You don't even have to argue that.
24 I'm going to say it again.

16:44:37 25 I know the Rules of Evidence. I know the law. But, I

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1 can't take your word when you say there's no hearsay in
2 there. All of the statements, we're not offering for the
3 truth of the matter asserted. I need to look at it. And
4 you need to identify to me what statements you want
16:44:57 5 redacted.

6 MR. O'SHEA: And here, Judge, in the classic
7 conspiracy situation, you've got a Person A, Joe, saying
8 this is what the Defendant B said to me. You know, and that
9 was in furtherance of the conspiracy. That's the
16:45:12 10 coconspirator.

11 Here they don't even -- they don't have any identity
12 of who made these statements. They just say some computer
13 network with identifying persons or anything else like that.

14 THE COURT: You need to identify -- folks, I
16:45:28 15 don't have it. Someone needs to show it to me.

16 MR. LEVINE: Will you identify so -- the
17 statement here I have written here.

18 MR. O'SHEA: Who's it from?

19 THE COURT: You know what? I'm going to let
16:45:41 20 them go home. We can't -- stay here.

21 MR. O'SHEA: Fair enough.

22 (Proceedings resumed within the hearing of the jury:)

23 THE COURT: Ladies and gentlemen, an issue has
24 arisen we're going to deal with outside of your hearing. So
16:45:56 25 instead of making you wait any longer, we're going to

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1 adjourn for the evening.

2 Please remember the admonition. Do not form any
3 opinion regarding this matter. Do not talk about the case
4 amongst yourselves or with anyone else.

16:46:09 5 Please be downstairs tomorrow morning, downstairs, not
6 up here, downstairs in the jury room at 9:00. We will call
7 for you at that time, and we will immediately begin as soon
8 as you are up.

9 Have a good evening, everyone. Oh, folks, the
16:46:27 10 notebooks must stay in the jury room, in the jury room. You
11 cannot take them home with you.

12 All rise for the jury.

13 (Proceedings in the absence of the jury:)

14 (The following proceedings were held at side bar:)

16:49:34 15 MR. O'SHEA: First of all, it's -- it's no
16 question in my mind, Judge, okay -- well, I thought we were
17 kind of doing the sound thing.

18 THE COURT: Yeah, but -- so she can hear.

19 MR. O'SHEA: I see. Got you. And so that the
16:49:52 20 witness can't hear, too. I got you.

21 So my thinking is, Judge, the bottom -- for instance,
22 to make the record clear --

23 THE COURT: Okay. For the record, we are
24 looking at Government's Exhibit 1324. The Government has
16:50:04 25 provided me a copy. Mr. O'Shea is now pointing out the

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1 hearsay, what he believes to be hearsay in this document.

2 MR. O'SHEA: At the bottom of 1324, at the
3 bottom left-hand corner, it says stuff like, "I can't comply
4 with every request." Anyway, "I sent you a Trojan. I'm not
16:50:23 5 the fake e-mail kind of guy." Surprisingly, out of 20 of
6 these e-mails, two more seem to be willingly sent to, "To
7 send, LOL," which I think means Laugh Out Loud.

8 The next page is -- if we just go to like the second
9 paragraph from the top of the next page of 1324, it says, "I
16:50:46 10 suppose you give a nice percentage of what we burn together.
11 You can always verify if that's" -- pardon me, "fucker got
12 burned. Simply call, though I have no way to" -- clearly
13 these are statements offered for their truth of the matter.
14 Clearly they are hearsay.

16:51:03 15 The question is, A, do they fit a definition, and I
16 assume they're going to use the coconspirator exception, but
17 I -- as I argued before, they haven't established the
18 conspiracy by the preponderance of the evidence yet.

19 And secondly, they don't even tell you who they're
16:51:17 20 from, Judge. It's from some entity without identifying the
21 person or anything else.

22 MR. LEVINE: So that's why we have offered
23 them under the coconspirator exception. They're in
24 furtherance of the conspiracy. If we knew specifically
16:51:36 25 which one of them made the statement, we would have offered

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1 it on the statement of a party opponent, but it is somebody
2 within the group. And it's clearly with a victim being --
3 you can see how they're being -- I don't know how to
4 characterize it, but I provide significant information about
16:51:52 5 the group, including that they're -- there are five of them,
6 about five guys doing this is what they said.

7 THE COURT: Okay.

8 This clearly is a statement in furtherance of a
9 conspiracy. Therefore, your objection based on hearsay is
16:52:08 10 not well taken.

11 MR. O'SHEA: Now the only -- my next proffer,
12 my exception to that Judge --

13 THE COURT: Sure.

14 MR. O'SHEA: Based on the Crawford analysis
16:52:18 15 and that is that because the Government has yet to identify
16 the individual from whom that came from, our ability,
17 Mr. Goldberg's and I, right to confront and cross-examine
18 that human being or whoever it was is non-existent and,
19 therefore, a Crawford violation.

16:52:37 20 MR. LEVINE: Your Honor, we briefed this
21 issue, and I think you just indicated you -- that you didn't
22 see a Crawford issue. The answer to this is that the
23 801(d), which is statements of a party opponent in
24 furtherance of the conspiracy, an admission, those are all
16:52:56 25 considered not hearsay and Crawford doesn't apply to them.

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1 The law is very clear in the Sixth Circuit and every other
2 circuit throughout this issue. I think the Supreme Court
3 has even addressed it.

4 THE COURT: I agree with the Government. Your
16:53:07 5 objection is not well taken.

6 MR. O'SHEA: Okay. But further -- thank
7 you --

8 MR. GOLDBERG: For the record, Mr. Nicolescu
9 makes the same objection. Thank you.

16:53:22 10 THE COURT: Overruled for the same reason.

11 MR. GOLDBERG: Of course.

12 THE COURT: All right. Thank you.

13 MR. LEVINE: Thank you, your Honor.

14 THE COURT: So because -- we're off the
16:53:31 15 record.

16 (Proceedings resumed within the hearing of the jury:)

17 THE COURT: We're in adjournment, folks.

18 (Proceedings adjourned at 4:53 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Shirle Perkins
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